

Dec 13, 2019

SEAN F. McAVOY, CLERK

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

DEBRA S.,¹

Plaintiff,

vs.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 2:19-cv-00131-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 14, 15

Before the Court are the parties' cross-motions for summary judgment. ECF Nos. 14, 15. The parties consented to proceed before a magistrate judge. ECF No.

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names.

² Andrew M. Saul is now the Commissioner of the Social Security Administration. Accordingly, the Court substitutes Andrew M. Saul as the Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P. 25(d).

1 6. The Court, having reviewed the administrative record and the parties' briefing,
2 is fully informed. For the reasons discussed below, the Court denies Plaintiff's
3 motion, ECF No. 14, and grants Defendant's motion, ECF No. 15.

4 **JURISDICTION**

5 The Court has jurisdiction over this case pursuant to 42 U.S.C. § 405(g).

6 **STANDARD OF REVIEW**

7 A district court's review of a final decision of the Commissioner of Social
8 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
9 limited; the Commissioner's decision will be disturbed "only if it is not supported
10 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
11 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
12 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
13 (quotation and citation omitted). Stated differently, substantial evidence equates to
14 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
15 citation omitted). In determining whether the standard has been satisfied, a
16 reviewing court must consider the entire record as a whole rather than searching
17 for supporting evidence in isolation. *Id.*

18 In reviewing a denial of benefits, a district court may not substitute its
19 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
20 1156 (9th Cir. 2001). If the evidence in the record "is susceptible to more than one

1 rational interpretation, [the court] must uphold the ALJ's findings if they are
2 supported by inferences reasonably drawn from the record." *Molina v. Astrue*, 674
3 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court "may not reverse an
4 ALJ's decision on account of an error that is harmless." *Id.* An error is harmless
5 "where it is inconsequential to the [ALJ's] ultimate nondisability determination."
6 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ's
7 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
8 *Sanders*, 556 U.S. 396, 409-10 (2009).

9 **FIVE-STEP EVALUATION PROCESS**

10 A claimant must satisfy two conditions to be considered "disabled" within
11 the meaning of the Social Security Act. First, the claimant must be "unable to
12 engage in any substantial gainful activity by reason of any medically determinable
13 physical or mental impairment which can be expected to result in death or which
14 has lasted or can be expected to last for a continuous period of not less than twelve
15 months." 42 U.S.C. § 423(d)(1)(A). Second, the claimant's impairment must be
16 "of such severity that he is not only unable to do his previous work[,] but cannot,
17 considering his age, education, and work experience, engage in any other kind of
18 substantial gainful work which exists in the national economy." 42 U.S.C. §
19 423(d)(2)(A).

1 The Commissioner has established a five-step sequential analysis to
2 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §
3 404.1520(a)(4)(i)-(v). At step one, the Commissioner considers the claimant's
4 work activity. 20 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in
5 "substantial gainful activity," the Commissioner must find that the claimant is not
6 disabled. 20 C.F.R. § 404.1520(b).

7 If the claimant is not engaged in substantial gainful activity, the analysis
8 proceeds to step two. At this step, the Commissioner considers the severity of the
9 claimant's impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers
10 from "any impairment or combination of impairments which significantly limits
11 [his or her] physical or mental ability to do basic work activities," the analysis
12 proceeds to step three. 20 C.F.R. § 404.1520(c). If the claimant's impairment
13 does not satisfy this severity threshold, however, the Commissioner must find that
14 the claimant is not disabled. 20 C.F.R. § 404.1520(c).

15 At step three, the Commissioner compares the claimant's impairment to
16 severe impairments recognized by the Commissioner to be so severe as to preclude
17 a person from engaging in substantial gainful activity. 20 C.F.R. §
18 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the
19 enumerated impairments, the Commissioner must find the claimant disabled and
20 award benefits. 20 C.F.R. § 404.1520(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must pause to assess
3 the claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
6 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

7 At step four, the Commissioner considers whether, in view of the claimant's
8 RFC, the claimant is capable of performing work that he or she has performed in
9 the past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is
10 capable of performing past relevant work, the Commissioner must find that the
11 claimant is not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of
12 performing such work, the analysis proceeds to step five.

13 At step five, the Commissioner considers whether, in view of the claimant's
14 RFC, the claimant is capable of performing other work in the national economy.
15 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the Commissioner
16 must also consider vocational factors such as the claimant's age, education, and
17 past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant is capable of
18 adjusting to other work, the Commissioner must find that the claimant is not
19 disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of adjusting to
20

1 other work, the analysis concludes with a finding that the claimant is disabled and
2 is therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

3 The claimant bears the burden of proof at steps one through four above.
4 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
5 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
6 capable of performing other work; and 2) such work “exists in significant numbers
7 in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d
8 386, 389 (9th Cir. 2012).

9 **ALJ’S FINDINGS**

10 On May 20, 2016, Plaintiff applied for Title II disability insurance benefits
11 alleging a disability onset date of March 26, 2015. Tr. 167-70. The application
12 was denied initially and on reconsideration. Tr. 92-98, 100-06. Plaintiff appeared
13 before an administrative law judge (ALJ) on February 7, 2018. Tr. 35-63. On
14 April 4, 2018, the ALJ denied Plaintiff’s claim. Tr. 15-34.

15 At step one of the sequential evaluation process, the ALJ found that Plaintiff
16 had not engaged in substantial gainful activity since March 26, 2015. Tr. 20. At
17 step two, the ALJ found that Plaintiff had the following severe impairments:
18 contusion right foot, sprain left foot, complex regional pain syndrome (CRPS), and
19 gout. Tr. 20.

1 At step three, the ALJ found that Plaintiff did not have an impairment or
2 combination of impairments that met or medically equaled the severity of a listed
3 impairment. Tr. 22. The ALJ then concluded that Plaintiff had the RFC to
4 perform sedentary work with the following limitations:

5 [Plaintiff] can occasionally lift and carry a maximum of 10 pounds
6 and can frequently lift and carry a maximum of less than 10 pounds.
7 She can stand and walk for two hours total in an eight-hour workday
8 with normal breaks. She can sit for six hours total in an eight-hour
9 workday with normal breaks. [Plaintiff] can occasionally balance;
stoop; crouch; kneel; crawl; and climb ramps and stairs. She can
never climb ladders, ropes, or scaffolds. [Plaintiff] can never have
exposure to hazards, such as unprotected heights or dangerous heavy
machinery.

10 Tr. 23.

11 At step four, the ALJ found Plaintiff was capable of performing her past
12 relevant work as a program aid and employment specialist. Tr. 27. Alternatively,
13 at step five, the ALJ found that considering Plaintiff's age, education, work
14 experience, RFC, and testimony from the vocational expert, there were jobs that
15 existed in significant numbers in the national economy that Plaintiff could perform,
16 such as charge account clerk and document preparer. Tr. 27-28. Therefore, the
17 ALJ concluded that Plaintiff was not under a disability, as defined in the Social
18 Security Act, from the alleged onset date of March 26, 2015, though the date of the
19 decision. Tr. 28.

1 On February 21, 2019, the Appeals Council denied review of the ALJ's
2 decision, Tr. 1-6, making the ALJ's decision the Commissioner's final decision for
3 purposes of judicial review. *See* 42 U.S.C. § 1383(c)(3).

4 ISSUES

5 Plaintiff seeks judicial review of the Commissioner's final decision denying
6 her disability insurance benefits under Title II of the Social Security Act. Plaintiff
7 raises the following issues for review:

- 8 1. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
- 9 2. Whether the ALJ properly evaluated the medical opinion evidence.

10 ECF No. 14 at 15.

11 DISCUSSION

12 A. Plaintiff's Symptom Claims

13 Plaintiff faults the ALJ for failing to rely on clear and convincing reasons in
14 discrediting her symptom claims. ECF No. 14 at 16-19. An ALJ engages in a two-
15 step analysis to determine whether to discount a claimant's testimony regarding
16 subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2. "First, the ALJ must
17 determine whether there is objective medical evidence of an underlying
18 impairment which could reasonably be expected to produce the pain or other
19 symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted). "The
20 claimant is not required to show that [the claimant's] impairment could reasonably

1 be expected to cause the severity of the symptom [the claimant] has alleged; [the
2 claimant] need only show that it could reasonably have caused some degree of the
3 symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

4 Second, “[i]f the claimant meets the first test and there is no evidence of
5 malingering, the ALJ can only reject the claimant’s testimony about the severity of
6 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
7 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
8 omitted). General findings are insufficient; rather, the ALJ must identify what
9 symptom claims are being discounted and what evidence undermines these claims.
10 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Thomas v.*
11 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
12 explain why it discounted claimant’s symptom claims)). “The clear and
13 convincing [evidence] standard is the most demanding required in Social Security
14 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
15 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

16 Factors to be considered in evaluating the intensity, persistence, and limiting
17 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
18 duration, frequency, and intensity of pain or other symptoms; 3) factors that
19 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
20 side effects of any medication an individual takes or has taken to alleviate pain or

1 other symptoms; 5) treatment, other than medication, an individual receives or has
2 received for relief of pain or other symptoms; 6) any measures other than treatment
3 an individual uses or has used to relieve pain or other symptoms; and 7) any other
4 factors concerning an individual's functional limitations and restrictions due to
5 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §
6 404.1529(c). The ALJ is instructed to "consider all of the evidence in an
7 individual's record," "to determine how symptoms limit ability to perform work-
8 related activities." SSR 16-3p, 2016 WL 1119029, at *2.

9 The ALJ found that Plaintiff's medically determinable impairments could
10 reasonably be expected to cause the alleged symptoms, but that Plaintiff's
11 statements concerning the intensity, persistence, and limiting effects of her
12 symptoms were not entirely consistent with the evidence. Tr. 24.

13 *1. Daily Activities*

14 The ALJ found that Plaintiff's activities were inconsistent with the level of
15 impairment Plaintiff alleged. Tr. 24. An ALJ may consider a claimant's activities
16 that undermine reported symptoms. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th
17 Cir. 2001). If a claimant can spend a substantial part of the day engaged in
18 pursuits involving the performance of exertional or nonexertional functions, the
19 ALJ may find these activities inconsistent with the reported disabling symptoms.
20 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Molina*, 674 F.3d at 1113.

1 “While a claimant need not vegetate in a dark room in order to be eligible for
2 benefits, the ALJ may discount a claimant’s symptom claims when the claimant
3 reports participation in everyday activities indicating capacities that are
4 transferable to a work setting” or when activities “contradict claims of a totally
5 debilitating impairment.” *Molina*, 674 F.3d at 1112-13.

6 Here, the ALJ indicated that Plaintiff reported she was unable to work due to
7 a multitude of symptoms, including dizziness, fatigue, difficulty with balance, lack
8 of stamina, numbness, limited range of motion, stiffness, difficulty sleeping,
9 standing, walking, kneeling, lifting, and reaching, difficulty with concentration and
10 memory loss, constant depression with feelings of sadness, lack of interest in
11 activities she used to enjoy, migraines that caused nausea, photosensitivity, and
12 required that she lie down in a dark quiet room, and swelling in her feet and legs
13 that required her to elevate her legs for several hours each day. Tr. 24 (citing Tr.
14 47-56, 216-26, 236, 242, 245-55). However, the ALJ noted that Plaintiff’s
15 allegations of disabling impairments were inconsistent with her active lifestyle. Tr.
16 24. The ALJ observed that Plaintiff stated she spent time each day with people in
17 person or talking on the phone, caring for pets, preparing meals, watching
18 television, and reading. Tr. 24 (citing Tr. 217, 222). The ALJ noted that Plaintiff
19 reported she did household chores in short increments of time, including cleaning,
20 laundry, and dishes. Tr. 24 (citing Tr. 220). The ALJ noted that Plaintiff stated

1 she drove a car, shopped in stores for groceries each week, spent time baking, and
2 was able to pay bills and manage finances. Tr. 24 (citing Tr. 52, 220-21, 607). The
3 ALJ cited Plaintiff's report that she was not socially isolated and regularly spent
4 time with her sister, her sister's husband, a friend, and her daughter. Tr. 24 (citing
5 Tr. 607). Further, the ALJ noted that Plaintiff reported to her primary care
6 provider in August 2016 that she was able to walk her dog every day. Tr. 24
7 (citing Tr. 428). The ALJ also cited Plaintiff's testimony that she climbed several
8 stairs in her home and three stairs outside her home each day, went out three or
9 four times each week, and frequently spent time outside sitting in her yard. Tr. 25
10 (citing Tr. 52-54). The ALJ reasonably concluded that these activities were
11 inconsistent with the debilitating level of impairment Plaintiff alleged and are
12 consistent with the ALJ's RFC of limited sedentary work. Tr. 24.

13 Plaintiff challenges the ALJ's finding by asserting that Plaintiff "did admit
14 that she performs these activities; however, she did not perform these activities for
15 [eight] hours a day." ECF No. 14 at 17. An ALJ may discount a claimant's
16 symptom claims when the claimant reports participation in everyday activities that
17 "contradict claims of a totally debilitating impairment." *Molina*, 674 F.3d at 1112-
18 13. Here, the ALJ identified Plaintiff's specific alleged impairments and noted
19 specific activities that indicated Plaintiff was less limited than she alleged. Tr. 24-
20

25. This was a clear and convincing reason to give less weight to Plaintiff's subjective symptom testimony.

2. Minimal Treatment and Improvement with Treatment

The ALJ found that Plaintiff's symptom complaints were inconsistent with Plaintiff's minimal treatment and the level of improvement she showed with treatment. Tr. 25. Evidence of "conservative treatment" is sufficient to discount a claimant's testimony regarding the severity of an impairment. *Parra v. Astrue*, 481 F.3d 742 (9th Cir. 2007) (citing *Johnson v. Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995) (treating ailments with an over-the-counter pain medication is evidence of conservative treatment sufficient to discount a claimant's testimony regarding the severity of an impairment)); *see also Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008) (holding that the ALJ permissibly inferred that the claimant's "pain was not as all-disabling as he reported in light of the fact that he did not seek an aggressive treatment program" and "responded favorably to conservative treatment including physical therapy and the use of anti-inflammatory medication, a transcutaneous electrical nerve stimulation unit, and a lumbosacral corset").

Further, the effectiveness of treatment is a relevant factor in determining the severity of a claimant's symptoms. 20 C.F.R. § 404.1529(c)(3); *see Warre v. Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (conditions effectively controlled with medication are not disabling for purposes of

determining eligibility for benefits) (internal citations omitted); *see also* *Tommasetti*, 533 F.3d at 1040 (a favorable response to treatment can undermine a claimant’s complaints of debilitating pain or other severe limitations).

Here, the ALJ found the record evidence showed that Plaintiff did not require significant forms of treatment, as her only podiatric surgical intervention was for the removal of ingrown toenails. Tr. 25. The ALJ also observed that Plaintiff’s swelling improved to a minimum with the use of prescribed pain medication and anti-inflammatory medication for a time, which was consistent with the ability to tolerate the restricted range of sedentary work outlined in the RFC. Tr. 25. Moreover, the ALJ noted that Plaintiff’s allegations of debilitating pain symptoms were inconsistent with her treatment records from physical therapy between April and October 2015, which documented improvement in her foot impairment. Tr. 25; *see, e.g.*, Tr. 318 (April 15, 2015: Plaintiff was given muscle relaxers which helped decrease her right foot pain and symptoms; treatment notes showed “[s]ignificantly decreased irritation in foot today”); Tr. 374 (April 28, 2015: treatment notes reported that Plaintiff was in physical therapy, tapering her pain medications, and the muscle relaxers “really are helping”); Tr. 326 (April 29, 2015: physical therapy treatment notes showed Plaintiff was “feeling better”); Tr. 344 (May 18, 2015: physical therapy treatment notes indicated Plaintiff had “increased tolerance to touch and standing”); Tr. 367 (June 26, 2015: physical

1 therapy treatment notes reported Plaintiff had “[d]ecreased irritation in foot”). The
2 ALJ reasonably concluded that Plaintiff’s minimal treatment, as well as the
3 improvement in her lower extremity swelling after participating in physical therapy
4 and the use of pain medication and anti-inflammatory medication, supported a
5 finding that Plaintiff was capable of sedentary work with additional functional
6 limitations, which was inconsistent with Plaintiff’s subjective symptom claims.
7 Furthermore, Plaintiff fails to challenge the ALJ’s conclusion, so argument on this
8 issue is waived. *See Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161
9 n.2 (9th Cir. 2008) (determining the court may decline to address the merits of
10 issues not argued with specificity); *Kim v. Kang*, 154 F.3d 996, 1000 (9th Cir.
11 1998) (recognizing the court may not consider on appeal issues not “specifically
12 and distinctly argued” in the party’s opening brief). Plaintiff’s treatment history,
13 documenting both minimal treatment and improvement with treatment, was a clear
14 and convincing reason to discredit Plaintiff’s symptom testimony.

15 3. *Lack of Supporting Medical Evidence*

16 The ALJ found the level of impairment Plaintiff alleged was not supported
17 by the medical evidence. Tr. 25-26. An ALJ may not discredit a claimant’s
18 symptom testimony and deny benefits solely because the degree of the symptoms
19 alleged is not supported by objective medical evidence. *Rollins*, 261 F.3d at 857;
20 *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair*, 885 F.2d at 601;

1 *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005). However, the objective
2 medical evidence is a relevant factor, along with the medical source's information
3 about the claimant's pain or other symptoms, in determining the severity of a
4 claimant's symptoms and their disabling effects. *Rollins*, 261 F.3d at 857; 20
5 C.F.R. § 404.1529(c)(2). As an initial matter, Plaintiff contends the ALJ
6 improperly discredited her symptom claims "solely because" her testimony was
7 not substantiated by objective medical evidence. ECF No. 14 at 18-19. However,
8 as discussed *infra* and *supra*, this contention has no factual basis, as the lack of
9 objective evidence was not the sole basis for the ALJ's analysis of Plaintiff's
10 claims. Plaintiff's argument ignores the three additional reasons set forth by the
11 ALJ which provide permissible reasons for discounting Plaintiff's symptom
12 claims.

13 Here, the ALJ found the objective medical evidence did not support the
14 disabling musculoskeletal impairments and chronic pain symptoms Plaintiff
15 described. Tr. 25-26; *see, e.g.*, Tr. 300, 302 (March 27, 2015: Plaintiff suffered a
16 right-foot contusion injury without evidence of fracture, as demonstrated from a
17 right foot x-ray); Tr. 453 (April 11, 2015: an x-ray of Plaintiff's right foot revealed
18 negative findings); Tr. 456-57 (April 11, 2015: an ultrasound of Plaintiff's right
19 foot demonstrated no evidence of any venous abnormality); Tr. 304 (June 15,
20 2015: a bone scan revealed mild pathology in Plaintiff's bilateral feet, including

1 mild increased radiotracer uptake in the left calcaneus, right Achilles tendon, and
2 bilateral mid-foot at the first metatarsophalangeal joint); Tr. 392 (November 20,
3 2015: treatment notes reported that an MRI of Plaintiff's right foot was consistent
4 with gout); Tr. 418-19 (December 22, 2015: a bone scan demonstrated minimal
5 degeneration in both of Plaintiff's feet but without any significant changes since
6 the June 2015 bone scan); Tr. 444 (November 19, 2016: an ultrasound of Plaintiff's
7 right lower extremity was normal and showed no evidence of right leg deep venous
8 thrombosis).

9 Further, the ALJ observed that except for noted swelling of Plaintiff's feet,
10 the objective findings and clinical observations consistently documented by
11 examining and treating providers in the record were generally mild and
12 unremarkable. Tr. 25-26; *see, e.g.*, Tr. 372 (April 2, 2015: treatment notes reported
13 Plaintiff was "really in no distress," her right foot was swollen across the dorsum,
14 there was no obvious discoloration, and no crepitus was noted); Tr. 456 (April 11,
15 2015: treatment notes showed no edema or significant bruising or swelling of
16 Plaintiff's right foot, although she did have tenderness over the metatarsal
17 phalangeal joint region); Tr. 374 (April 28, 2015: treatment notes showed Plaintiff
18 was no longer using crutches, her right foot was a little swollen across the dorsum,
19 there was no obvious discoloration, and no crepitus was noted); Tr. 306 (June 2,
20 2015: an examining podiatrist noted bilateral edema of Plaintiff's dorsal foot with

1 an otherwise normal vascular, neurological, and musculoskeletal examination, and
2 CRPS was suggested as a possible diagnosis); Tr. 378 (June 3, 2015: Plaintiff
3 presented wearing flip-flops and ambulating without crutches, her right foot was
4 swollen across the dorsum, there was blotchy discoloration, and no crepitus was
5 noted); Tr. 762 (June 8, 2015: Plaintiff was ambulating normally); Tr. 763 (July
6 22, 2015: Plaintiff had normal gait and station, normal motor strength and tone,
7 and her extremities were unremarkable); Tr. 476, 479 (October 10, 2015: treatment
8 notes stated that Plaintiff reported exacerbation of her foot pain, but a physical
9 examination revealed no obvious deformities or issues with her feet, no peripheral
10 edema, and no clubbing or cyanosis of Plaintiff's extremities); Tr. 399 (January 12,
11 2016: treatment notes showed that Plaintiff had an independent medical
12 examination with an orthopedist, neurologist, and rheumatologist, and they
13 determined she did not have CRPS and could return to full duty); Tr. 496
14 (September 27, 2016: a physical examination revealed Plaintiff's upper and lower
15 extremity strength was equal bilaterally, and all joints had active and passive full
16 range of movement and were free from deformity, erythema, warmth, or effusion);
17 Tr. 511 (October 4, 2016: treatment notes showed Plaintiff had good range of
18 motion in all major joints, tenderness down into the left sciatic notch, she moved
19 all four extremities appropriately, was up and ambulatory independently without
20 difficulty, with intact distal pulses, no edema, and no tenderness); Tr. 524 (October

1 5, 2016: Plaintiff demonstrated good range of motion in all major joints); Tr. 442
2 (November 19, 2016: Plaintiff's chief complaint was right leg and calf pain, but
3 treatment notes reported Plaintiff noted mild swelling that was "not obvious on
4 inspection," and upon examination Plaintiff's right leg was normal in appearance,
5 and there was no discoloration); Tr. 443 (November 19, 2016: an emergency
6 department provider reported that Plaintiff had "a very benign physical exam"); Tr.
7 551 (November 21, 2016: Plaintiff's upper and lower extremity strength was equal
8 bilaterally, all joints had active and passive full range of movement and were free
9 from deformity, erythema, warmth, or effusion); Tr. 561 (November 22, 2016:
10 Plaintiff had no joint tenderness, deformity, or swelling); Tr. 573 (December 1,
11 2016: Plaintiff denied extremity weakness, joint pain, joint swelling, joint
12 tenderness, joint redness, stiffness, muscle aches, muscle weakness, or muscle
13 cramps); Tr. 649 (June 20, 2017: Plaintiff had no edema and showed good range of
14 motion in all major joints); Tr. 680 (June 30, 2017: Plaintiff had no edema, no
15 tenderness, and good range of motion in all major joints); Tr. 884-85 (January 16,
16 2018: Plaintiff's primary care physician noted swelling in her bilateral feet, some
17 discoloration in the skin, and tenderness across the metatarsophalangeal joints, but
18 no crepitus).

19 Plaintiff disputes the ALJ's determination that the objective medical
20 evidence did not support her symptom claims, asserting instead that the medical

1 evidence of record supported a finding of disability. ECF No. 14 at 18-19. The
2 Court may not reverse the ALJ's decision based on Plaintiff's disagreement with
3 the ALJ's interpretation of the record. *See Tommasetti*, 533 F.3d at 1038 (“[W]hen
4 the evidence is susceptible to more than one rational interpretation” the court will
5 not reverse the ALJ's decision). On this record, the ALJ reasonably concluded that
6 the objective medical evidence did not support the level of musculoskeletal
7 impairments and chronic pain symptoms Plaintiff alleged. Tr. 25-26. The lack of
8 support in the medical evidence coupled with the other reasons articulated
9 provided clear and convincing reasons to give less weight to Plaintiff's subjective
10 symptom testimony.

11 4. *Unprescribed Use of a Cane*

12 The ALJ also discounted Plaintiff's symptom allegations because Plaintiff's
13 treatment notes failed to indicate that her use of a cane was medically prescribed.
14 Tr. 24. An ALJ may discount a claimant's subjective complaints based on the
15 unprescribed use of an assistive device, such as a cane. *See Chaudhry v. Astrue*,
16 688 F.3d 661, 671 (9th Cir. 2012); *see also Tommasetti*, 533 F.3d at 1040. Here,
17 the ALJ noted that although Plaintiff alleged that she used a cane to climb stairs,
18 balance, and prevent falling, Plaintiff also admitted that no doctor had ever
19 prescribed the use of a cane. Tr. 24; *see* Tr. 254 (Plaintiff reported that her cane
20 was not prescribed). In her opening brief, Plaintiff concedes that no medical

1 source “specifically advise[d] her to use a cane.” ECF No. 14 at 18. However,
2 Plaintiff argues that her providers “knew that she required a cane to ambulate.”
3 ECF No. 14 at 18. As noted *supra*, the Court may not reverse the ALJ’s decision
4 based on Plaintiff’s disagreement with the ALJ’s interpretation of the record. *See*
5 *Tommasetti*, 533 F.3d at 1038. The ALJ reasonably concluded that Plaintiff’s use
6 of an unprescribed cane did not support the level of musculoskeletal impairments
7 and chronic pain symptoms Plaintiff alleged. Tr. 24.

8 **B. Medical Opinion Evidence**

9 Plaintiff challenges the ALJ’s evaluation of the medical opinions of
10 Alexander Kats, M.D., P.Z. Pearce, M.D., Heather Tick, M.D., Christopher
11 Anderson, M.D., and Mary Gallegos, ARNP. ECF No. 14 at 20; ECF No. 16 at 6,
12 8. Plaintiff only specifically challenges the ALJ’s findings related to the diagnosis
13 of CRPS. ECF No. 14 at 19-20.

14 There are three types of physicians: “(1) those who treat the claimant
15 (treating physicians); (2) those who examine but do not treat the claimant
16 (examining physicians); and (3) those who neither examine nor treat the claimant
17 [but who review the claimant’s file] (nonexamining [or reviewing] physicians).”
18 *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001) (citations omitted).
19 Generally, a treating physician’s opinion carries more weight than an examining
20 physician’s opinion, and an examining physician’s opinion carries more weight

1 than a reviewing physician's opinion. *Id.* at 1202. "In addition, the regulations
2 give more weight to opinions that are explained than to those that are not, and to
3 the opinions of specialists concerning matters relating to their specialty over that of
4 nonspecialists." *Id.* (citations omitted).

5 If a treating or examining physician's opinion is uncontradicted, the ALJ
6 may reject it only by offering "clear and convincing reasons that are supported by
7 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
8 "However, the ALJ need not accept the opinion of any physician, including a
9 treating physician, if that opinion is brief, conclusory, and inadequately supported
10 by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
11 (9th Cir. 2011) (internal quotation marks and brackets omitted). "If a treating or
12 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ
13 may only reject it by providing specific and legitimate reasons that are supported
14 by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830–
15 31. The opinion of a nonexamining physician may serve as substantial evidence if
16 it is supported by other independent evidence in the record. *Andrews v. Shalala*,
17 53 F.3d 1035, 1041 (9th Cir. 1995).

18 "Only physicians and certain other qualified specialists are considered
19 '[a]cceptable medical sources.'" *Ghanim*, 763 F.3d at 1161 (alteration in original);
20

1 *see* 20 C.F.R. § 404.1513 (2013).³ However, an ALJ is required to consider
2 evidence from non-acceptable medical sources. *Sprague v. Bowen*, 812 F.2d 1226,
3 1232 (9th Cir. 1987); 20 C.F.R. § 404.1513(d) (2013). “Other sources” include
4 nurse practitioners, physicians’ assistants, therapists, teachers, social workers,
5 spouses and other non-medical sources. 20 C.F.R. § 404.1513(d) (2013). An ALJ
6 may reject the opinion of a non-acceptable medical source by giving reasons
7 germane to the opinion. *Ghanim*, 763 F.3d at 1161.

8 *I. Dr. Kats*

9 On February 24, 2017, state agency medical consultant Alexander Kats,
10 M.D., reviewed the medical record and opined that Plaintiff would be able to
11 occasionally and frequently lift and/or carry 10 pounds, stand and/or walk for two
12 hours, and sit for about six hours in an eight-hour workday. Tr. 78-91. Dr. Kats
13 opined that Plaintiff would be able to occasionally climb ramps, stairs, ladders,
14 ropes, and scaffolds, and occasionally balance, kneel, crouch, and crawl due to
15 obesity and pain in her feet from CRPS. Tr. 88. Dr. Kats determined that Plaintiff
16 would be able to frequently stoop. Tr. 88. He noted that Plaintiff must avoid

17
18 ³ For cases filed prior to March 27, 2017, the definition of an acceptable medical
19 source, as well as the requirement that an ALJ consider evidence from non-
20 acceptable medical sources, are located at 20 C.F.R. § 404.1513(d) (2013).

1 concentrated exposure to hazards. Tr. 89. The ALJ gave Dr. Kats' opinion
2 significant weight. Tr. 26.

3 Plaintiff contends the ALJ erred by giving significant weight to the opinion
4 of Dr. Kats, a reviewing physician, and little weight to the diagnosis of CRPS by
5 Plaintiff's treating and examining providers. ECF No. 14 at 20. The opinion of a
6 nonexamining physician may serve as substantial evidence if it is supported by
7 other evidence in the record and is consistent with it. *Andrews*, 53 F.3d at 1041.
8 Other cases have upheld the rejection of an examining or treating physician based
9 in part on the testimony of a nonexamining medical advisor when other reasons to
10 reject the opinions of examining and treating physicians exist independent of the
11 nonexamining doctor's opinion. *Lester*, 81 F.3d at 831 (citing *Magallanes v.*
12 *Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989) (reliance on laboratory test results,
13 contrary reports from examining physicians and testimony from claimant that
14 conflicted with treating physician's opinion)); *Roberts v. Shalala*, 66 F.3d 179, 184
15 (9th Cir. 1995) (rejection of examining psychologist's functional assessment which
16 conflicted with his own written report and test results). Thus, case law requires not
17 only an opinion from the consulting physician but also substantial evidence (more
18 than a mere scintilla but less than a preponderance), independent of that opinion
19 which supports the rejection of contrary conclusions by examining or treating
20 physicians. *Andrews*, 53 F.3d at 1039.

1 The ALJ found that Dr. Kats' opinion was consistent with the objective
2 medical evidence and with the clinical findings of Plaintiff's examining medical
3 sources. Tr. 26. The ALJ also determined that Dr. Kats was familiar with Social
4 Security regulations and disability programs and he had the opportunity to review
5 Plaintiff's medical evidence. Tr. 26. Plaintiff suggests the ALJ should have
6 credited the diagnosis of CRPS by Plaintiff's treating and examining providers
7 over the opinion of the reviewing doctor. ECF No. 14 at 20. However, Plaintiff
8 fails to articulate how the ALJ erred in weighing the medical source opinions and
9 the CRPS diagnosis, as Dr. Kats assessed limitations based on Plaintiff's "obesity
10 and feet pain from complex regional pain syndrome," Tr. 88, and the ALJ found
11 Plaintiff's CRPS to be a severe impairment which was accounted for in
12 formulating the RFC, Tr. 20, 23. As discussed *infra*, the ALJ provided a legally
13 sufficient reason for giving less weight to the opinion of Plaintiff's treating
14 provider, Dr. Pearce, and for giving more weight to Dr. Kats' opinion. Also
15 discussed *infra*, the ALJ was not required to weigh the findings of Plaintiff's other
16 disputed providers.

17 2. Dr. Pearce

18 Plaintiff's treating provider, P.Z. Pearce, M.D., completed Labor and
19 Industries Activity Prescription Forms from April 2015 to June 2017. Tr. 830-71.
20 The forms prepared by Dr. Pearce indicated that Plaintiff would be limited to

1 lifting and carrying between five to 10 pounds, sitting for up to six hours, and
2 standing or walking for one hour. Tr. 830-71. Dr. Pearce opined Plaintiff would
3 also have postural and environmental restrictions. Tr. 830-71. Dr. Pearce
4 diagnosed Plaintiff with CRPS. Tr. 843-71.

5 The ALJ gave Dr. Pearce's opinion some weight, discounting his opined
6 restriction to standing and walking for only one hour. Tr. 26. Because Dr.
7 Pearce's opinion was contradicted by the nonexamining opinion of Dr. Kats, Tr.
8 88-89, the ALJ was required to provide specific and legitimate reasons for
9 discounting Dr. Pearce's opinion. *Bayliss*, 427 F.3d at 1216. In this regard,
10 Plaintiff's sole contention in her opening brief is that "here, that was not done."
11 ECF No. 14 at 19-20. However, it is insufficient for Plaintiff to mention this
12 possible argument, but fail to address or challenge the ALJ's reason for rejecting
13 Dr. Pearce's opinion.⁴ *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925,

14
15 ⁴ Counsel has a duty to substantively brief the issues presented for this Court's
16 serious and just consideration. Fed. R. Civ. P. 1; LCivR 1; Wash. Rule of Prof'l
17 Conduct 1.3. This Court has previously admonished Plaintiff's counsel for
18 inadequate briefing. *See, e.g., Rainey v. Comm'r of Soc. Sec.*, No. 2:17-cv-00271-
19 FVS (E.D. Wash. Sept. 25, 2018) (Report and Recommendation, ECF No. 17 at 6-
20 10) (adopted Oct. 11, 2018). The absence of developed argument is an

1 930 (9th Cir. 2003) (“We require contentions to be accompanied by reasons.”);
2 *McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) (“[I]ssues adverted to
3 in a perfunctory manner, unaccompanied by some effort at developed
4 argumentation, are deemed waived. It is not sufficient for a party to mention a
5 possible argument in a most skeletal way, leaving the court to . . . put flesh on its
6 bones.”). Therefore, any challenges are waived, and the Court may decline to
7 review them. *See Carmickle*, 533 F.3d at 1161 n.2 (determining Court may decline
8 to address on the merits issues not argued with specificity); *Kim*, 154 F.3d at 1000
9 (the Court may not consider on appeal issues not “specifically and distinctly
10 argued” in the party’s opening brief).

11 Despite Plaintiff’s waiver, the Court has conducted an independent review of
12 the ALJ’s decision and finds the ALJ’s rejection of Dr. Pearce’s standing and
13 walking limitation is supported by specific and legitimate reasons supported by
14 substantial evidence in the record. The ALJ found that Dr. Pearce’s opined
15 restriction to standing and walking for only one hour was internally inconsistent

16 _____
17 unacceptable manner of advocacy and a disservice to Plaintiff and the legal
18 profession. Counsel is cautioned that the opening brief must include analysis
19 supported by citations to the record and an explanation why, in the context of the
20 case, reversible error has occurred.

1 with Dr. Pearce's own clinical findings. Tr. 26. Relevant factors to evaluating any
2 medical opinion include the amount of relevant evidence that supports the opinion,
3 the quality of the explanation provided in the opinion, and the consistency of the
4 medical opinion with the record as a whole. *Lingenfelter v. Astrue*, 504 F.3d 1028,
5 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Moreover,
6 a physician's opinion may be rejected if it is unsupported by the physician's
7 treatment notes. *See Connett v. Barnhart*, 340 F.3d 871, 875 (9th Cir. 2003). The
8 ALJ noted that Dr. Pearce's clinical findings showed Plaintiff had only mild
9 physical abnormalities. Tr. 26; *see, e.g.*, Tr. 878 (August 30, 2017: Dr. Pearce
10 reported Plaintiff was "really in no distress today," although she was in a
11 wheelchair, both feet were swollen, she was generally tender across the MTP
12 joints, but no crepitus was noted; Plaintiff's bone scan was unremarkable, an MRI
13 of Plaintiff's right foot was consistent with gout, and there was effusion of the
14 MTP joints); Tr. 880 (October 11, 2017: Dr. Pearce reported Plaintiff was "really
15 in no distress today," although she was in a wheelchair, and both feet were
16 swollen); Tr. 882 (December 5, 2017: Dr. Pearce reported Plaintiff was "really in
17 no distress today," she was walking with a cane, and her right knee was still
18 somewhat swollen from a fall); Tr. 885 (January 16, 2018: Dr. Pearce reported
19 Plaintiff was "really in no distress today," she was walking with a cane, and her
20 right knee was still somewhat swollen from a fall); Tr. 884-85 (Dr. Pearce

1 acknowledged that radiology imaging and an EMG nerve conduction study yielded
2 no evidence of significant pathology); Tr. 399 (Dr. Pearce acknowledged that
3 Plaintiff had an independent medical examination with an orthopedist, neurologist,
4 and rheumatologist, and they determined she did not have CRPS and could return
5 to full duty).

6 In her reply brief, Plaintiff states she is not asking this Court to reweigh the
7 evidence or substitute its judgment for the judgment of the ALJ, but rather,
8 Plaintiff asserts “there is only one way” to read the medical records and opinion of
9 Dr. Pearce. ECF No. 16 at 8. To the extent the evidence could be interpreted
10 differently, it is the role of the ALJ to resolve conflicts and ambiguity in the
11 evidence. *Morgan v. Comm’r of Soc. Sec. Admin.*, 169 F.3d 595, 599-600 (9th Cir.
12 1999). Where, as here, evidence is subject to more than one rational interpretation,
13 the ALJ’s conclusion will be upheld. *Burch*, 400 F.3d at 679; *Hill*, 698 F.3d at
14 1158 (recognizing the court only disturbs the ALJ’s findings if they are not
15 supported by substantial evidence). The ALJ provided a specific and legitimate
16 reason to discount Dr. Pearce’s opined standing and walking limitation.

17 *3. Dr. Tick, Dr. Anderson, Ms. Gallegos*

18 On November 18, 2016, Heather Tick, M.D., noted that Plaintiff’s
19 symptoms of pain, numbness, skin color change, and misalignment of her right
20 toes met the criteria for CRPS. Tr. 429. On July 5, 2017, Plaintiff’s right knee

1 was evaluated by Christopher Anderson, M.D., after she slipped, fell, and injured
2 her right knee. Tr. 873-74. Dr. Anderson recommended that Plaintiff participate
3 in physical therapy, and noted he did “not foresee needing any type of ACL repair
4 work, given her poor preexisting ambulatory condition.” Tr. 874. Treatment notes
5 from July 6, 2017 showed that Mary Gallegos, ARNP, diagnosed Plaintiff with
6 CRPS. Tr. 783. The ALJ discussed Dr. Tick’s CRPS diagnosis and observations,
7 Tr. 25-26, but did not weigh the opinions of Dr. Tick, Dr. Anderson, or Ms.
8 Gallegos.

9 Plaintiff argues that the ALJ erred by not giving controlling weight to the
10 opinions of these providers, as “[e]ach doctor believed that the objective findings
11 supported the diagnosis of [CRPS].” ECF No. 14 at 20. Treatment notes, in
12 general, do not constitute medical opinions. *See* 20 C.F.R. § 404.1527(a)(2)
13 (“Medical opinions are statements from acceptable medical sources that reflect
14 judgments about the nature and severity of your impairment(s), including your
15 symptoms, diagnosis and prognosis, what you can still do despite impairment(s),
16 and your physical or mental restrictions.”). The Ninth Circuit has found no error in
17 ALJ decisions that do not weigh statements within medical records when those
18 records do not reflect physical or mental limitations or otherwise provide
19 information about the ability to work. *See, e.g., Turner v. Comm’r of Soc. Sec.*,
20 613 F.3d 1217, 1223 (9th Cir. 2010) (recognizing that when a physician’s report

1 did not assign any specific limitations or opinions regarding the claimant's ability
2 to work, "the ALJ did not need to provide 'clear and convincing reasons' for
3 rejecting [the] report because the ALJ did not reject any of [the report's]
4 conclusions."); *see also Key v. Heckler*, 754 F.2d 1545, 1549 (9th Cir. 1985) (the
5 "mere diagnosis of an impairment ... is not sufficient to sustain a finding of
6 disability."). Here, the treatment notes, findings, and observations of Dr. Tick, Dr.
7 Anderson, and Ms. Gallegos concern only medical diagnoses and do not address
8 any functional limitations or opinions regarding Plaintiff's ability to work. Tr.
9 429, 783, 873-74. Therefore, the ALJ did not need to provide reasons to reject the
10 findings of these providers, and did not err in weighing the opinion evidence.
11 *Turner*, 613 F.3d at 1223.

12 CONCLUSION

13 Having reviewed the record and the ALJ's findings, the Court concludes the
14 ALJ's decision is supported by substantial evidence and free of harmful legal error.
15 Accordingly, **IT IS HEREBY ORDERED:**

16 1. The District Court Executive is directed to substitute Andrew M. Saul as
17 the Defendant and update the docket sheet.

18 2. Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is **DENIED**.

19 3. Defendant's Motion for Summary Judgment, **ECF No. 15**, is
20 **GRANTED**.

1 4. The Clerk's Office shall enter **JUDGMENT** in favor of Defendant.

2 The District Court Executive is directed to file this Order, provide copies to
3 counsel, and **CLOSE THE FILE**.

4 DATED December 13, 2019.

5 s/Mary K. Dimke
6 MARY K. DIMKE
7 UNITED STATES MAGISTRATE JUDGE
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